

# Compendium of Recent Significant Decisions Involving Performance Based Actions (1988-1998)



## Burden of Proof

- ! An initial decision reversed the agency's removal of a supervisor because the agency failed to prove by substantial evidence that the employee failed to meet the Fully Successful level in the three elements at issue and because the agency was guilty of sex discrimination. The full Board sustained the Administrative Judge's (AJ's) holding on the insufficiency of the agency's evidence, finding that the employee was charged with performance deficiencies that were actually attributable to a subordinate employee, the PIP<sup>1</sup> assignment was characterized in an absolute manner which exceeded the annual standard requirements, and comparable performance by other similar organizations was not considered below fully successful by the agency. The Board rejected the AJ's assertion that the fact that the agency failed to prove its case of unacceptable performance was sufficient to establish the affirmative defense of sex discrimination. The Board remanded the case for a determination on the sex discrimination allegation based on the proper standard for review. *Carter v. Small Business Administration*, 61 MSPR 656 (1994).
- ! Reviewing the remand initial decision of the AJ, the Board found that the agency had failed to meet its burden of proving unacceptable performance by substantial evidence. The agency had given the appellant a three-part assignment to show improvement in one critical element and the Board disagreed with the AJ's finding that failure in one significant aspect of the assignment warranted a failure of the entire element. In his dissent, Vice-Chair Amador stated that an agency is entitled to "a bit greater deference when positions with a significant impact on public safety are concerned" (the appellant was a scientist responsible for testing the quality of the nation's milk). *Purcell v. Department of Agriculture*, 61 MSPR 317 (1994).

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<sup>1</sup>**NOTE:** Throughout this document, "opportunity to improve" and "performance improvement period (PIP)" are used interchangeably.

- ! The agency removed an air traffic controller for failure to complete the training program but elected to take the action under Chapter 43 rather than Chapter 75. Because of that, the agency was bound by all the procedural and substantive requirements of Chapter 43. The agency did not include in the record a copy of the employee's critical elements, performance standards, or the agency's performance appraisal system. The Board, in a split decision, determined that the absence of these items meant the agency could not establish that the employee's performance on the standards was unacceptable as required by Chapter 43. The Board held that the employee's stipulation that her performance was "not satisfactory" was not sufficient to satisfy the agency's burden of proof under Chapter 43. *Stenmark v. Department of Transportation*, 59 MSPR 462 (1993).
- ! In a case involving a critical element with multiple components, the Board reopened the case on its own motion to address the issue of conflicting testimony from the proposing and deciding officials. The proposing official testified that the appellant failed three components of the element while the deciding official stated that he believed the appellant only failed two of the components. Because of the contradictory evidence presented, the agency failed to meet its burden of proof under the "substantial evidence" standard and the Board rejected the agency's arguments on the component in question. However, the appellant's failure under the two remaining components was sufficient to find him unacceptable on the element as a whole and the removal action was sustained. *Griggs v. Department of Army*, 53 MSPR 597 (1992).
- ! The Board upheld the agency's denial of a within-grade increase and performance-based removal actions, finding that the agency's witnesses were credible and the appellant's argument that the agency failed to present substantial documentary evidence was without merit. The Board also examined the "marginal" standard and found that it was not harder to achieve simply because it established more specific time frames than the "fully successful" standard. *Cohen v. General Services Administration*, 53 MSPR 492 (1992).
- ! In a case involving the use of work samples as proof of unacceptable performance, the Board approved the use of samples but found fault with the manner in which the agency collected the samples used in this case. The agency's testimony that the supervisor reviewed records "until he felt he had seen enough" did not meet the Board's requirement for "some objective [and] systematic method for selecting examples of alleged unacceptable performance." The Board also found that the agency's sampling constituted less than 7% of the appellant's work under the standard. The agency's action was reversed. *Bowling v. Department of Army*, 47 MSPR 379 (1991).
- ! In an application of the Board's reconsideration decision in *Brown v. Veterans Administration* (1990), the court found that the agency was entitled to rely on instances of



deficient performance occurring in the one year preceding the proposal notice. Here, the agency provided the appellant with two opportunities to improve; both of which the appellant failed. The agency proposed to remove the appellant, citing instances of poor performance which occurred during the first PIP. An administrative judge reversed the agency based upon the first *Brown* decision which only allowed an agency to consider performance during the PIP in taking an action. Following the second *Brown* decision, the agency petitioned for review and the Board upheld the removal action. The appellant appealed and the court affirmed the Board decision. The court found that the agency could rightfully rely on instances occurring within the one year period, provided the appellant had failed the second PIP. *Addison v. Health and Human Services*, 945 F.2d 1184 (Fed.Cir. 1991).

- ! The Board modified its earlier decision and held that an agency was entitled to rely on performance deficiencies occurring anytime during the year preceding the notice of proposed action if it could show that the employee failed to demonstrate or sustain acceptable performance after receiving a reasonable opportunity to do so, *Brown v. Veterans Administration*, 44 MSPR 635 (1990). Upon review of the evidence, the Board found no error in the AJ's conclusion that the agency did not present substantial evidence that the appellant's performance during her improvement period was unacceptable. The appellant's removal was not sustained. *Hollins v. Department of Treasury*, 46 MSPR 305 (1990).
- ! The AJ reversed an employee's removal for unacceptable performance in two critical elements. The agency petitioned for review. The Board issued an order noting the related issues between this case and *Brown v. Veterans Administration*, *infra*, regarding the use of pre-PIP and post-PIP performance and accepted *amicus* briefs from OPM and other Federal agencies. The Board held that an agency may rely on instances of unacceptable performance (in the same critical elements) that occurred after the successful completion of a PIP as long as these instances occur within the one year prior to the proposal notice. The Board also found that agencies may not delay taking action by more than one year after the beginning of the PIP. Beyond the one year time frame, if performance again falls, the agency is required to place the employee on a new PIP before initiating a Chapter 43 action. This holding on "roller coaster" performance is consistent with OPM regulation at 5 Part 432.105. The Board reiterated that an agency may rely on an employee's performance during both the pre- and post-PIP periods in combination with the performance during the actual PIP itself. The burden then falls to the Board to determine on a case-by-case basis what constitutes a substantial evidence showing of unacceptable performance. This case was remanded for further consideration and adjudication. *Sullivan v. Department of the Navy*, 44 MSPR 646 (1990).



- ! When the Board remanded a removal action because the AJ had erroneously considered instances of deficient performance which occurred prior to the start of the PIP, OPM intervened. OPM argued that this ruling was an unwarranted extension of the Board's holding in *Wilson v. Department of the Navy*, 24 MSPR 583 (1984), which stated that proof of unacceptable performance in a Chapter 43 appeal does not require the agency to establish that an employee's performance was unacceptable prior to the notice of an opportunity to improve. On reconsideration, the Board held that an agency is entitled to rely on performance deficiencies occurring in the one year preceding the notice of proposed action if it can first show that the appellant failed to demonstrate acceptable performance after receiving a reasonable opportunity to do so. The Board also held that in rating the appellant's performance during the improvement period under numerical standards relating to annual performance, the agency may measure performance during the PIP by proportional standards. However, the Board will examine the proportional standards for reasonableness and to ensure that the agency proves that the appellant's performance was unacceptable under the annual standards. *Brown v. Veterans Administration and OPM*, 44 MSPR 635 (1990).
  
- ! The employee appealed her removal for failure to satisfactorily complete required "up or out" training. Following a remand decision which reversed the agency, the Board held that the employee did not establish that her failure to receive all training due her at a particular level under a specific instructional program guide caused her to fail a higher level, and that the employee did not show that her training was ineffective because it was subsequently revised. On appeal to the Federal Circuit, the court found that the Board had erroneously placed the burden of proof regarding sufficiency of the training program on the appellant. Because the agency established the necessity for specific training in order to progress to the next "phase" of the program, the burden was on the agency to show that an omission in that training would not harm the employee's development in future phases. Considering the evidence that, following the appellant's removal, the agency increased the requirements for this phase of the training program, the court found sufficient evidence to reverse the agency's action because it did not meet the efficiency of the service. *Wright v. Transportation, FAA*, 900 F.2d 1541 (Fed.Cir. 1990).
  
- ! The Board vacated an initial decision upholding an agency's performance-based removal action and remanded for findings and conclusions on material issues presented in the case. In its discussion of the case, the Board noted that the agency had used unacceptable performance in one component of a standard as the basis of the action but had failed to inform the employee of his deficiencies or provide him with an opportunity to improve performance in that component. The Board stated that it was *not holding* that an agency may never take action on this basis but, in this case, the component at issue involved



totally different tasks and requirements from the component cited in the PIP notice. *Atamantyk v. Department of Defense*, 49 MSPR 432 (1991).

## OPM Plan Approval

- ! The Board sustained an arbitration decision which upheld the agency's removal action based on unacceptable performance. The standards at issue were found to be valid and the employee was provided with additional information regarding performance expectations by her supervisor. The appellant claimed that the Social Security Administration did not obtain approval of its performance system but the Board found that approval of an agency-wide performance system (in this case the approval granted to HHS) is sufficient to cover its internal component organizations. *Scillion v. Health and Human Services*, 45 MSPR 521 (1990).

## Communication of Standards

- ! The Board issued several key holdings in a case where the project assigned to the appellant during the PIP was, in fact, one of the components of the critical element the appellant was failing. The Board also held that the action was not flawed by the agency's change in performance standards at the beginning of the opportunity period. Relying heavily on supervisory testimony, the Board found that the annual standard provided a list of anticipated projects and time frames which the supervisor routinely adjusted to meet constantly changing priorities. In a confusing final holding, the Board stated that the agency could have exercised its right to change the performance standard at the start of the PIP since the employee would have been on notice of change "at or before the beginning of the appraisal period which forms the basis of the action against the employee." However, the Board specifically did not reverse its prior holding in *Boggess v. Air Force*, 31 MSPR 461 (1986) which stands for the opposite proposition. *Smallwood v. Department of Navy*, 52 MSPR 678 (1992).
- ! The Board held that where standards involve multiple components, an agency is obligated to cite all aspects of the performance standards which the appellant is alleged to have failed. In its proposal and decision notices, the agency failed to specify which of the components of the performance standard the appellant had failed. Without this information, the Board found that it could be assumed that the appellant met some of the standard's components and failed others. The Board remanded the case for further adjudication to allow the parties to address the issue. *Kadlec v. Department of Army*, 49 MSPR 534 (1991).



- ! The agency demoted the appellant for unacceptable performance in the critical element of Supervision/Personnel Management. In the initial decision, the AJ reversed the agency finding that it had failed to prove the appellant's unacceptable performance because several of the specifications cited by the agency did not properly fall under the critical element at issue in the action. On review, the Board reversed the AJ and held that although some of the specifications could also be charged under different critical elements in the employee's performance plan, the agency did not err in taking them under the element addressing supervisory skills. The Board also noted that the appellant was well aware that the agency would consider these types of errors under the "Supervision" element since the notice of unacceptable performance which began the opportunity period included examples of unacceptable performance similar to the specifications cited in the decision. *Parham v. Department of Navy*, 41 MSPR 207 (1989).
  
- ! The employee petitioned for review of an initial decision (ID) which sustained the agency's removal action. The Board found that the agency properly communicated to the employee the performance standards and critical elements of his position prior to the removal action. The appellant alleged that the agency wrongfully based the removal action on the employee's performance prior to the one-year period before the notice of proposed removal. The Board found that although the agency may have referenced prior performance deficiencies in the removal action, the error is harmless in that the employee had two 60-day opportunities to improve (PIP's) and the employee failed to perform satisfactorily during either of the two PIP periods. The appellant also failed to show a causal connection between the removal and either discrimination or reprisal. The Board sustained the agency's removal action. *Golden v. Department of the Army*, 41 MSPR 501 (1989).
  
- ! The Board held that the employee had sufficient notice of his performance standard, and that the agency's failure to include all his alleged performance deficiencies in the proposal notice was not harmful error. The appellant alleges that he was never informed of the minimum acceptable standard for his position, however he had been performing under the same standard for five years and continued to do so during his PIP. (Strike one.) The appellant alleged that he was not given an opportunity to respond to his performance deficiencies because the agency did not list them all in the notice. The Board found that the agency cited current examples to the appellant during his PIP as to his alleged deficiencies, and there was no evidence that the appellant was confused about or unable to respond to the agency's charges. (Strike two.) The appellant also alleges age discrimination. Although the appellant is in a protected class, there is no evidence of a causal relationship between his age and the removal action. Strike three, agency's removal action is sustained. *O'Hearn v. General Services Administration*, 41 MSPR 280 (1989), affirmed 902 F.2d 44 (Fed.Cir. 1990).



- ! The Board held that the administrative judge erred in finding that the employee's performance standards were invalid. On appeal, the AJ cited *Donaldson v. Department of Labor*, 27 MSPR 293 (1985), in finding that the standards were invalid because the agency identified the Fully Successful level of performance, but not the Minimally Successful level. The full Board found that the *Donaldson* holding applied to the rating assigned to individual critical elements and noted that the agency only used three levels in its performance plan. Therefore, the performance plan did communicate the acceptable level required for the employee's retention in his position. The Board reversed and remanded the ID. *Seplavy v. Veterans Administration*, 41 MSPR 251 (1989).

### Performance Standards - Objectivity and Reasonableness

- ! The Board vacated an initial decision and remanded the case for a new determination where it disagreed with the AJ's decision that an agency had imposed a performance standard that was not attainable and, therefore, not valid. The standard at issue required the appellant to "compile, coordinate, and submit an annual report." In the PIP notice, the agency required him to perform this assignment in 120 days. The AJ found that due to staffing shortages and other issues beyond the appellant's control, the work could not be done and the standard must be invalidated because it was unattainable. The full Board rejected this argument and found that the standard, on its face, did not require an unreasonably high level of performance. However, the Board remanded the case for an examination of whether the appellant's other assignments and the staffing shortage impacted on the reasonableness of the opportunity period. *Hober v. Department of Army*, 64 MSPR 129 (1994).
- ! Where the agency improperly prorated a numerical standard during the PIP, the Board will only hold the appellant to the correct quantitative standard. Here, the Board corrected the agency's PIP requirement of 65 assignments to 50, based on the annual requirement and the duration of the PIP. The agency's evidence was inconclusive on a number of assignments which the appellant turned in but were never reviewed. The Board found that the appellant submitted 57 assignments during the PIP, which was within the corrected prorated standard and, therefore, reversed the removal action. *Jensen v. Department of Agriculture*, 61 MSPR 469 (1994).
- ! In the removal of a GS-14 attorney under Chapter 43, the Board finds that the appellant's performance standards using the terms "sometimes" and "rarely" did not make them invalid. The Board held that there is "no requirement that every trace of subjective judgment be wrung out of a standard in favor of mechanical devices, such as numerical measurements." The appellant also challenged the agency's performance plan, arguing that it was not approved by OPM. The Board held that the agency need not obtain OPM



approval of critical elements or standards or minor changes to the performance plan once the overall plan was approved by OPM. *Satlin v. Department of Veterans Affairs*, 60 MSPR 218 (1993).

- ! The agency's performance-based removal action was reversed because the Board found the agency had failed to provide an adequate definition of "error" in its standards or its PIP notice to the employee. Because the standard addressed "dispensing" prescriptions and the appellant's error was detected before the prescription was dispensed, no error occurred under the standard. Further, the Board invalidated the agency's standard regarding requirements for filling prescriptions because it was absolute and the agency was unable to prove that one instance of failure would result in loss of life or injury. *Smith v. Department of Veterans Affairs*, 59 MSPR 340 (1993).
- ! The Board vacated the decision of the administrative judge where the AJ had erroneously determined that the performance standard at issue was vague and devoid of any quantitative measurement process. The Board found that the AJ failed to consider that the agency gave content to the standard through counseling and memoranda to the appellant. Further, the Board corrected the AJ's assumption that all standards must contain production or time standards. The case was remanded for a determination of whether the appellant performed at an acceptable level under the performance standards. *Hurd v. Department of Interior*, 53 MSPR 107 (1992).
- ! The Board reversed an initial decision where the AJ erroneously declared a performance standard invalid because it only described the Fully Successful level. Here, the agency demonstrated that its performance appraisal system only used three levels in rating critical elements and, therefore, the standard was valid. The Board went on to find that the AJ failed to make sufficient findings regarding the employee's opportunity to perform and his allegation of handicap discrimination. The case was remanded back to the MSPB regional office for further adjudication of these two issues. *Clifford v. Department of Agriculture*, 50 MSPR 232 (1991).
- ! The Board concurred with the AJ's analysis that the agency had failed to properly "flesh out" a standard that was inappropriately vague. The agency found the employee had failed his critical element involving written and oral communication because his work did not meet the marginal standard which included the following language: "Rewrite may sometimes be required on products dealing with complex, multi-faceted issues" and "Sometimes has difficulty in conveying position regarding complex ideas, concepts, and situations." The Board found that the agency failed to present substantial evidence that, in practice and/or by agency instruction, the employee was on notice as to what performance was required to achieve the marginal level. *Smith v. Energy*, 49 MSPR 110 (1991).





- ! The Board sustained the agency's removal action, finding that under the agency's three-level rating system for critical elements, the fully successful level provided an objective benchmark for the appellant. The Board also found that the phrase "normally acceptable" did not render the standard invalid because the agency had given content and specificity to the standard during counseling sessions with the employee. Finally, the Board found that a standard is not impermissibly vague because a work assignment can be applied to more than one critical element. *Sherrell v. Department of Air Force*, 47 MSPR 534 (1991).
- ! The Board held that an agency's performance standard was impermissibly vague and that the agency failed to prove that it had given content and specificity to the standard in its communications with the appellant. The Board noted that the supervisor had been unable to testify during the hearing as to what "value judgment" was made in determining acceptable performance. *O'Neal v. Department of Army*, 47 MSPR 433 (1991).
- ! The Board held that a "nonroutine special tasks" component of an employee's critical element was a valid performance standard, that the agency proved by substantial evidence that the employee's performance was unacceptable and that a 30-day PIP did afford the employee a reasonable opportunity to improve. In the ID, the AJ reversed the removal action finding that the non-routine tasks portion of a critical element was either impermissibly vague or impermissibly absolute. On review, the Board disagreed finding the standard was valid. Simply because a standard may allow for some subjective judgment on the part of an employee's supervisor does not automatically invalidate it. The Board found that the agency had communicated to the appellant what was required of her both prior to and during the PIP. The Board reversed the ID and sustained the agency's removal action. The Board's decision was affirmed by the Court of Appeals for the Federal Circuit. *Melnick v. HUD*, 42 MSPR 93 (1989), affirmed 899 F.2d 1228 (Fed.Cir. 1990).
- ! In her appeal, the appellant alleged that her performance standards were invalid and that she did not commit the charged deficiencies. The AJ found that although the appellant had been counseled on how to perform her duties, she was never notified of what would constitute an unacceptable level of performance. The Board found the AJ's action of not sustaining the agency proper, however it reopened the case to correct statements made by the AJ. The Board held that a performance standard is not invalid simply because it could have been written more precisely, and that there is not a *per se* requirement for an agency to include quantitative criteria each performance standard. Therefore, the AJ erred when he implied that the performance standards in this case were invalid because they could have been written more objectively. The error was not harmful, however, since the full Board invalidated the standards because they recited job duties but did not express



expectations of performance. *Bronfman v. General Services Administration*, 40 MSPR 184 (1989).

### Performance Standards - Absolute

- ! The employee was removed for unacceptable performance, the AJ reversed the decision, the agency petitioned for review arguing that the AJ erred in determining that component A of the appellant's standard was absolute, and that the appellant's unacceptable performance in a second component -B- of the same standard did not warrant an unacceptable rating as a whole. The Board found that the AJ correctly determined that component A requiring the employee to provide "one draft of transcriptions with not more than three typographical errors and *no errors in final form*" was absolute and therefore invalid. The Board found that component A was absolute, but that component B was valid. In reversing the initial decision, the Board found that the AJ erred in determining that the appellant's unacceptable performance under component B did *not* warrant an unacceptable rating on the critical element as a whole. The appellant had received a notice specifically detailing her deficient performance in component B, and also received continuous counseling and training. The Board found that the appellant "knew or should have known" of the significance of component B, and that a deficiency in that component justified the removal action. The Board reversed the AJ's decision, upholding the removal. *Mendez v. Department of the Air Force*, 62 MSPR 579 (1994).
- ! The AJ reversed the agency's removal action finding that the agency's standard was absolute and failed to meet the requirements of *Callaway v. Army*, 23 MSPR 592 (1984). Additionally, the AJ found unreasonable the standard of allowing only 5-6 errors per reporting period and stated that the agency had abused its discretion. On review, the Board held that the AJ erred in finding an absolute standard existed but reversed the action anyway because it found the standard did constitute an abuse of discretion. Addressing the agency's argument that the AJ misunderstood the formula applied in the standard, the Board found that even by applying the agency's interpretation of the formula, allowing an error rate of .426% was an abuse of discretion. Further, the agency failed to demonstrate that similarly situated employees were able to meet the established error rate for the critical element. *Russi v. Department of Army*, 40 MSPR 585 (1989).
- ! The Board reversed the AJ's finding that the standard was invalid and found that the plain meaning of acceptable performance does not preclude the possibility of an error by an employee in the following standard:  
 "Ensure all records are maintained in accordance with appropriate regulations and directives and are in "inspection" readiness condition. All corrective action/update must be initiated within 10



days after notification. Inspection results must not reveal reoccurring deficiencies from past years."

The standard sets a time limit for the employee to begin corrections, and anticipates that the employee will cure past deficiencies so they will not reoccur. The Board found that the performance standard, although arguably less than precise, is not absolute, unreasonable, or unattainable. The Board also found that an agency may give content to a performance standard which is not as precise as it could be by use of oral and written instructions, as well as by other methods of informing the employee of the agency's expectations. In this case, the agency did communicate its expectations and did give content to the standard. Finally, the Board found that the agency did support by substantial evidence that the appellant was afforded an opportunity to improve, and that the appellant's performance was indeed unacceptable. The agency's removal action was sustained. *Johnson v. Department of the Army*, 44 MSPR 464 (1990).

- ! This case involved a removal for unacceptable performance under the following standard: "(1) He [will] make use of all sources of leads and arrange five appointments a week or one per day to ensure mission accomplishment; and (2) his production during the rating period [may] not fall to such a level [that] it cannot be brought up to 100% mission accomplishment by the end of the fiscal year." The AJ found that the agency abused its discretion solely because it failed to state specifically whether weekly performance quotas could be carried over to the following month, and because it required accomplishment of 100% of the assigned mission. On review, the Board found that the performance standard was sufficiently objective and precise and met statutory requirements. The Board found that the standard simply provided a numerical, objective means of measuring the appellant's productivity. This standard, unlike an absolute standard, provided a level of performance which the appellant could exceed and did not allow the agency to remove or demote him simply for one instance of poor performance. The appellant alleged he did not understand the standard and the agency's expectations were not communicated to him. The Board found no merit in this argument in that the agency communicated to the appellant its expectations in a performance evaluation and a warning letter of unacceptable performance. *Gonzalez v. Department of the Army*, 40 MSPR 241 (1989).

## Performance Standards - Backwards

- ! The Board reiterates its position that, unless a standard is beyond salvage because it is "backward" in nature, an agency may demonstrate that subjective standards have been "fleshed out" to provide the employee with a clear notice of what is acceptable performance. The detailed instructions given to the employee in the written "Warning of Unacceptable Performance" as well as evidence of day-to-day communications from the



supervisor were sufficient to put the employee on notice as to the agency's performance expectations. *Dancy v. Department of Navy*, 55 MSPR 331 (1992).

- ! The Board reopened this case on its own to resolve what it termed "material issues of law" unresolved by the administrative judge. Despite appellant's failure to raise the issue and the AJ's decision not to address it, the Board examined the performance standards in effect for the appellant's position and found them invalid because they described the unacceptable level of performance rather than the acceptable level (i.e., "backwards" standards). The Board overturned the initial decision, which had been based on the overwhelming evidence of unacceptable performance, and held that the backwards standards precluded consideration of the charged performance deficiencies. *Burnett v. Health and Human Services*, 51 MSPR 615 (1991).
- ! The Board denied the appellant's request to set aside an arbitrator's decision which upheld the agency's removal and denial of within-grade increase actions. The appellant challenged the validity of her standards and submitted an arbitrator's decision in a case involving a coworker in which one of the standards (also applied to the appellant's performance) was found to be invalid. The Board held that it would not defer to an arbitration decision issued in another case not presently before it. The Board deferred to the arbitrator's decision that the standards were not "backward" but general in nature and, therefore, could be "fleshed out" for purposes of clarification. *Rupp v. Health and Human Services*, 51 MSPR 456 (1991).
- ! The Board reversed the initial decision which sustained the agency's removal action because it found the performance standard in which the agency charged unacceptable performance did not identify the marginal level of performance required for acceptable performance. Citing the holdings in *Eibel v. Department of Navy*, 857 F.2d 1439 (Fed. Cir., 1988) and *Stone v. Department of Health and Human Services*, 38 MSPR 634 (1988), the Board found that the minimally successful standards used were invalid despite the agency's efforts to clarify them. *Burroughs v. Health and Human Services*, 49 MSPR 644 (1991).
- ! In a case involving "backward" standards, the Board rejected the agency's argument that the administrative judge may not raise the issue of the validity of the appellant's performance standards on his own. The Board stated that the validity or adequacy of standards never lies very deep below the surface on the issue of whether or not the agency proved unacceptable performance. It upheld the initial decision which reversed the employee's demotion. *Ortiz v. Department of Justice*, 46 MSPR 692 (1991).

### **Opportunity to Demonstrate Acceptable Performance**



- ! The Board affirmed the agency's performance based removal and did not find evidence to support the appellant's charge that the agency had prejudged her performance and failed to provide her with assistance during the opportunity period. The appellant presented testimony from several individuals that they had heard, through another source, that the appellant's first and second line supervisors made comments that the appellant would not be in her position for long. The Board noted the lack of credibility in second-hand testimony and also found that the evidence regarding the opportunity period demonstrated that the first line supervisor acted appropriately in providing the employee with a meaningful opportunity to improve. Specifically, the Board found evidence that the employee simply did not carry out any of the assignments during the opportunity period. Further, she had been instructed to contact her supervisor for assistance and failed to do so, even when the supervisor met with her to discuss her lack of productivity and asked her if she needed any assistance. The Board found adequate written feedback was provided to the appellant throughout the opportunity period. *Goodwin v. Air Force*, 75 MSPR 204 (1997)
  
- ! The appellant was removed for unacceptable performance in a critical element. She appealed, alleging invalid performance standards, improper extension of the PIP, and failure to afford her with a reasonable opportunity to improve. On appeal, the AJ found that the appellant did not receive personal counseling or instructions during the PIP, and therefore, did not receive a "substantive opportunity to improve." On review, the Board found that there is no mechanical requirement regarding the form of assistance required in 5 USC §4303 which states that "an agency shall offer assistance to the employee in improving unacceptable performance." During the PIP, the appellant received at least 12 written evaluations of her work performance. The Board stated that "the agency's detailed guidance regarding the appellant's performance during the PIP suffers no disqualification merely because it was delivered in written form, rather than orally." The case was remanded to the regional office for adjudication on the merits. *Gjersvold v. Treasury*, 68 MSPR 331 (1995).
  
- ! The Board overturned an initial decision that held that the agency failed to provide sufficient training and assistance during the opportunity period. The Board found that the amount and level of assistance provided by the agency to the employee during her opportunity period (including the training given to the employee) satisfied the agency's regulatory obligations to provide the employee with a reasonable opportunity to improve. The agency's assistance included having the supervisor and another employee available for training and assistance during her PIP and having the supervisor provide weekly feedback to the employee on her performance. The Board remanded the case for a determination on whether the agency proved its charges of unacceptable performance since the initial



decision did not make such a determination. *Corbett v. Department of Air Force*, 59 MSPR 288 (1993).

- ! The Board reversed a Part 432 removal action because the agency failed to provide a reasonable opportunity to improve. The agency, upon determining that the employee's performance was unacceptable, assigned the employee to another location and supervisor at the start of the PIP but did not alter the employee's duties, position title or series. The Board found that this action constituted a detail, regardless of the nature of the duties, and applied its holding in *Smith v. Navy*, 30 MSPR 253 (1986), that an employee can only be fired for unacceptable performance in his/her position of record, i.e., not a position to which he/she is detailed. Secondly, the Board noted that the agency changed the employee's performance standards at the start of the PIP and thereby deprived him of a reasonable opportunity, *Boggess v. Air Force*, 31 MSPR 461 (1986). This decision is significant in that the Board never cited to its more recent decision, *Smallwood v. Navy*, 52 MSPR 678 (1992), in which it allowed that agencies could alter standards at the start of an opportunity period. Smallwood remains an anomaly in the Board's case law in this area. *Betters v. FEMA*, 57 MSPR 405 (1993).
- ! The Board found it necessary to remand the appeal of a removal for unacceptable performance where the AJ failed to make appropriate credibility determinations concerning the statutory right to a reasonable opportunity to improve. In its remand order, the Board reviewed its key holdings on the issue of the reasonableness of an opportunity period. (This decision serves as a valuable piece of research on this topic.) *Woytak v. Department of Army*, 49 MSPR 687 (1991).
- ! The Board held that the appellant was not given a reasonable opportunity to improve his performance because he did not receive adequate notice of a make-up test following his earlier failure of the test. (A passing score was necessary in order to meet the critical element on academic performance). The Chapter 43 removal was reversed. *Gormley v. Department of Navy*, 48 MSPR 181 (1991).
- ! The appellant was removed for unacceptable performance in two critical elements of his position. The Board found that the AJ erred in finding that the appellant was not given a reasonable opportunity to demonstrate acceptable performance. The record indicated that the appellant was placed on a PIP of six months which the Board found to be a reasonable, if not lengthy, opportunity-to-improve. The appellant alleged that because he was detailed for 21 days during his PIP, the opportunity period was shortened and did not allow him to prove acceptable performance. In earlier case law, the Board had held that 30 days may constitute a reasonable period and found, in this case, that an opportunity period is not unreasonable simply because the agency shortened it. The Board agreed



with the AJ's finding that the appellant's performance standards were valid and properly communicated to the appellant. Although the appellant had been reassigned to a position description with a different number, his performance standards and critical elements remained the same, were valid and had been properly communicated to the appellant. *Luscri v. Department of the Army*, 39 MSPR 482 (1989), affirmed 887 F.2d 1094 (Fed.Cir. 1989).

- ! An employee who was removed for unacceptable performance challenged the agency's assertion that he had been given a reasonable opportunity to improve, claiming that specific assistance promised him in his PIP was not received. Relevant language in the PIP notice read: "During the opportunity period I will spend as much time as possible with you so I can aid you and answer any question you might have. I will help you improve your measurement techniques and assist you in any way I can to help you bring your QVI reject rate within the fully successful or higher range... To the extent possible I will meet with you every Monday morning around 0800 to apprise you of the status of your performance". Because the agency failed to prove that the appellant had indeed received the assistance promised in his Notice of Unacceptable Performance, it failed to prove that the appellant had received the required meaningful opportunity to improve. The Board ordered the appellant's removal canceled. *Adorador v. Department of the Air Force*, 38 MSPR 461 (1988).

**NOTE:** Also see *Addison, Hollins, Sullivan and Brown* in the section **Burden of Proof**.

### Procedural Error

- ! The Court of Appeals for the Federal Circuit issued a decision on an agency's failure to meet the time requirements of 5 USC §4303(c)(1) for issuing a decision notice in a removal action for unacceptable performance. The court rejected the appellant's argument that the agency's action must be reversed because the appellant failed to raise any issue of harm resulting from the procedural error. This decision is unique only because this requirement in the law is rarely raised as a defense and there is little case law on the issue. *Diaz v. Air Force*, U.S. Court of Appeals for the Federal Circuit, Appeal No. 95-3149 (Fed. Cir., 8/21/95).
- ! The Board concurred in an initial decision which sustained the agency's performance-based removal. The appellant alleged that the agency failed to follow an internal policy requiring management to consider reassignment or demotion prior to removing an employee for unacceptable performance. The agency presented un rebutted evidence that, prior to proposing removal, a good-faith search was made for appropriate vacancies for



the appellant. Absent any testimony to the contrary, the Board sustained the agency's action. *Robinson v. Department of Army*, 50 MSPR 412 (1991).

- ! The Board held that *ex parte* communications between proposing and deciding officials and other persons or officials during the decision-making process are proper unless the appellant can demonstrate a violation of statute, OPM regulation, or agency internal regulation. The appellant failed to provide evidence or testimony that the deciding official predicated his decision on allegations or information not included in the proposal notice and which the appellant had no opportunity to refute. *Masood v. Department of Navy*, 49 MSPR 399 (1991).

## Chapter 75 Performance-Based Actions

- ! In a Chapter 75 removal action involving three charges, one of which was unacceptable performance, the administrative judge sustained two charges but not the charge of unacceptable performance, finding that the performance standards given to the employee did not create a “benchmark” against which the employee’s performance could be measured. The full Board reversed the judge’s decision which had mitigated the removal to a 60-day suspension. The Board held that specific performance standards need not be established and identified in advance for the employee in an action brought under Chapter 75. The Board found that the agency demonstrated that its measurement of performance was accurate and reasonable through other means such as a memorandum of unsatisfactory performance given to the employee, a 90-day performance improvement plan which had been extended for 60 days, and the administrative judge’s own assessment of the evidence regarding the employee’s performance. Citing to the case law addressing charges of poor performance taken under Chapter 75, the Board found the charge sustained and then reinstated the agency’s penalty of removal since all of its charges had been proven. *Shorey v. Army*, 77 MSPR 239 (1998).
- ! Although the charge in the case was not unacceptable performance, this case is included in this compendium because it demonstrates those circumstances under which an agency will need to shift toward addressing misconduct issues that arise in the midst of addressing unacceptable performance. The agency had provided the employee with an opportunity to improve unacceptable performance. During the opportunity period, the employee administered the wrong medication to a patient and refused to use appropriate assistance in transporting patients. The agency removed the employee for negligence in the performance of her duties and the Board noted that it was appropriate for the agency to consider her poor performance in assessing the appropriate penalty. *Ware v. Veterans Affairs*, 76 MSPR 427 (1997).





- ! The Board reversed an agency's removal action for unacceptable performance taken under Part 752. Specifically, the agency charged the employee with failure to perform work as assigned and failure to follow supervisory instructions. The Board found insufficient evidence from the agency that the employee had been put on notice that she was responsible for assignments cited in the proposal notice. The testimony of the employee's supervisor was determined to be "vague" and did not support the agency's charge. *Harriss v. Navy*, 68 MSPR 427 (1995).
- ! In a petition for review of the initial decision mitigating the agency's removal action to a demotion, the Board held that in taking an action under Chapter 75, the agency "need not track the formal standards set forth in a performance appraisal system, but may rely instead upon ad hoc standards, so long as these standards are based on criteria which permit an accurate measurement of job performance." The agency removed the appellant for unacceptable performance and failure to follow supervisory instruction. Regardless of the type of standards used, ad hoc or formal, the agency bears the burden of proving the unacceptable performance. The Board concurred with the AJ that the agency's first two performance charges were not supported by preponderant evidence. The Board found, however that the AJ erred in finding that the agency's third charge *was* supported by preponderant evidence and in finding that the second charge of insubordination was also supported by the evidence. The Board upheld only one charge of insubordination and further mitigated the penalty from a demotion to a letter of reprimand. *Cowins v. Veterans Affairs*, 64 MSPR 551 (1994).
- ! The Board reiterated its position that in accordance with the decision in *Lovshin v. Navy*, 767 F.2d 826 (Fed. Cir. 1985) the agency had authority to remove the employee under Chapter 75 for reasons which were primarily performance based, i.e., the employee's procurement authority was revoked based on his failure to adequately perform his contracting duties. However, the Board remanded the case because the AJ failed to examine the employee's performance standards and determine whether the agency imposed a different standard in its Chapter 75 action than would have been possible in a Chapter 43 action based on existing performance standards. The Board distinguished this case from its holding in *Graham v. Air Force*, 46 MSPR 227 (1990) where there were no performance standards in existence that addressed the deficiency cited in the Chapter 75 action. The Board will not sustain a performance based action under Chapter 75 if the agency is holding the employee to a higher standard than is required in established performance standards. *McGillivray v. FEMA*, 58 MSPR 398 (1993).
- ! The appellant requested that the Board review an arbitration decision which upheld the agency's removal action. The primary arguments made by the appellant were that the agency discriminated against her on the basis of a handicapping condition and that the



agency could not take a performance based action under Chapter 75. The Board found no basis for setting aside the arbitrator's award concerning the issue of discrimination and cited *Lovshin v. Navy*, 767 F.2d 826 (Fed. Cir. 1985) for the holding that the agency's Chapter 75 action was proper. *Hilton-Boy v. Health and Human Services*, 56 MSPR 176 (1992).

- ! The Board affirmed the agency's demotion action based on the appellant's unsatisfactory performance in one critical element, Personnel Management/Supervision. Because of the appellant's performance standards, a warning letter, other documents about deficient performance, and a three-month extension of his rating period to show improvement, the agency's failure to afford a formal opportunity period was not a sufficient basis, standing alone, to mitigate the penalty. Note: According to *Fairall v. VA*, an employee subject to a performance-based action under Chapter 75 is not entitled to a performance improvement period but the failure to provide such a period is relevant to penalty considerations as to whether the employee was on notice that deficient performance might be the basis for adverse action. *Madison v. Defense Logistics Agency*, 48 MSPR 234 (1991).
- ! A doctor was removed from his position for failure to maintain his medical credentials. On appeal, the Board held that the agency's action (basically a performance action taken under Chapter 75) was not subject to reversal solely on the basis that the agency did not identify in advance a specific set of standards governing the particular performance deficiencies cited in the action. The appellant did not argue or submit evidence that the agency's ad hoc standard of "basic medical care" was unreasonable or did not provide an accurate measurement by which to judge his performance. Therefore the appellant's assertion that the agency's action should be reversed solely on the basis that it did not identify a particular standard must fail. *Graham v. Department of the Air Force*, 46 MSPR 227 (1990).
- ! The appellant was removed, under Chapter 75, for his failure to satisfactorily complete a portion of the agency's training program. The appeal was stalled for several years while the MSPB and the Federal Circuit debated the issue of performance-based Chapter 75 actions. Finally, the United States Court of Appeals for the Federal Circuit issued its decision in *Lovshin v. Department of the Navy*, 767 F.2d 826 (Fed.Cir.1985), which held that Chapter 75 remained available for use in performance-based adverse actions, despite the enactment of Chapter 43 and the case was reviewed on the merits. The appellant alleged that the agency was under a duty to rule on his last minute request for an extension of his response period. The Board found that the agency is under no such obligation. The Board upheld the AJ's determination that the agency's allocation of training hours was reasonable and refused to overturn the AJ's determination on credibility issues. The



appellant alleged he did not receive a performance improvement period. The Board held that an employee under a Chapter 75 performance-based adverse action does not have a statutory right to a performance period, and the fact that an improvement period was not afforded is not, in itself, a sufficient basis for mitigating a penalty. The Board found that a PIP is not a relevant consideration in this case because the developmental program in which the appellant failed, by its nature, was a continuous opportunity to improve. *Pawlak v. Transportation, FAA*, 40 MSPR 546 (1989).

! The employee was removed for gross negligence for committing a potentially life threatening medication error. The appellant admitted to the error claiming mitigating circumstances. The AJ found the charges were proven by a preponderance of the evidence and upheld the removal. On review, the appellant alleged the AJ erred in denying her request for the medical records of the patients involved. (The AJ denied the request stating that release of the records would violate the Privacy Act.) The Board found that the agency had not proven that the medical records were part of a system of records covered under the Privacy Act. Therefore, it remanded this issue to the AJ to determine if the appellant should have access to the patient records. The appellant also alleged that the AJ acted arbitrarily and committed harmful error. The Board rejected both these claims. The appellant also alleged that she was being held to a higher standard of performance because the adverse action was taken under Chapter 75 instead of Chapter 43. The Board found no merit in this argument. *Giltner v. Department of the Air Force*, 39 MSPR 253 (1988).

! A senior executive was removed under Chapter 75 for two charges of misconduct and three charges of performance deficiencies. The AJ affirmed, the Board upheld and the appellant went to the Federal Circuit. The Federal Circuit remanded the case for further adjudication on whether the agency would have removed the appellant based solely on the charges sustained by the Board. (Only two of the performance charges were sustained.) On remand, the Board found that the agency did not prove by a preponderance of the evidence that it would have removed the appellant based on the two (of five) sustained charges. The removal action was not sustained. *Berube v. General Services Administration*, 37 MSPR 448 (1988).

### "Up or Out" Training

! In a Part 752 action involving the employee's failure to complete a required training program, the Board held that it has no authority to mitigate a removal penalty if no agency policy exists which requires reassignment. This case concerns those "up-or-out" training programs which are a condition of employment. The Board held that it will examine carefully any agency requirements for finding alternative employment for employees who



fail this type of program. If none exists, the agency's removal penalty will not undergo mitigation review. *Radcliffe v. Department of Transportation*, 57 MSPR 237 (1993).

- ! The appellant was demoted for failing to satisfactorily complete a recertification training course upon his reinstatement. The appellant's main allegation was that he was not given a reasonable opportunity to improve. A PIP is not required in a Chapter 75 action but may be relevant in consideration of the propriety of a penalty. Because the Board had previously held that a developmental training program, by its very nature, is a continuous opportunity to improve, the Board found the agency, although not required, did afford the appellant an opportunity period. The Board agreed with the AJ that the appellant did in fact receive sufficient training and that the appellant had not established a causal connection between his age and the agency's action. The agency's action demoting the appellant was sustained by the Board. *Davis v. Transportation, FAA*, 39 MSPR 470 (1989).



